CASE #_____

SUPREME COURT OF THE
UNITED STATES OF AMERICA

1994 TERM

WILLIAM FIELD AND NORINNE FIELD

v.

PHILIP W. MANS

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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47 pp

QUESTION PRESENTED FOR REVIEW

Given that 11 U.S.C. § 523 (a)(2)(A) requires proof that creditors rely on a debtor's fraudulent actions in order that a debt be excepted from discharge in Bankruptcy under 11 U.S.C. § 523 (a)(2)(A), and given that the Bankruptcy Court has found fraud and reliance by the creditor upon the debtor's misrepresentations, is it also necessary that the creditor prove that its reliance upon the fraudulent misrepresentation was reasonable?

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United States Bankruptcy Court for the District of New Hampshire BK #90-12385 Chapter 7 Adv. #91-1194 Judgment #46 Book 4 unpublished opinion, final judgment dated May 11, 1993.

United States District Court for the District of New Hampshire C-93-41-L, unpublished order dated December 7, 1993.

Civil Action #1:93-CV-0041-L, United States District Court for the District of New Hampshire judgment dated January 27, 1993, on order of December 7, 1993.

United States District Court for the District of New Hampshire, C-93-401-L, order dated March 22, 1994.

United States Court of Appeals for the First Circuit 94-1391 unpublished opinion dated August 29, 1994.

GROUNDS ON WHICH JURISDICTION OF THE UNITED STATES SUPREME COURT IS INVOKED

This is an appeal of the judgment entered August 29, 1994 by the United States Court of Appeals for the First Circuit, affirming the judgment of the United States District Court for the District of New Hampshire dated December 7, 1993, affirming the decision of the United States Bankruptcy Court dated May 11, 1993, finding the debt of the defendant to the plaintiffs to be dischargeable in Bankruptcy.

Certiorari is sought in accordance with 28 U.S.C. §1254 (1) and United States Supreme Court Rules Rule 10.1(a) and 10.1(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS

**UNITED STATES CONSTITUTION
ARTICLE I, SECTION 8:**

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject to Bankruptcies throughout the United States; ...

28 U.S.C. § 1254

Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a Court of Appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

**11 U.S.C.A. § 523 (a)(2)(A)
(West 1994)**

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual from any debt --

> (2) for money, property, or services, or an extension, renewal, or refinancing or credit, to the extent obtained, by --
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition; ...

**11 U.S.C.A. § 523 (a)(2)(B)
(West 1994)**

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) or this title does not discharge an individual from any debt --

CONSTITUTIONAL AND STATUTORY PROVISIONS

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ARTICLE I, SECTION 8:

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> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition; ...

11 U.S.C.A. § 523 (a)(2)(B) (West 1994)

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) or this title does not discharge an individual from any debt --

(2) for money, property, or services, or an extension, renewal, or refinancing of credit, to the extent obtained, by --

(B) use of a statement in writing --

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied;

(iv) that the debtor caused to be made or published with intent to deceive;

...

UNITED STATES SUPREME COURT RULES:

RULE 10 Considerations Governing Review on Writ of Certiorari

.1 A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

...

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

...

STATEMENT OF THE CASE

In June, 1986 the plaintiffs, William and Norinne Field (Fields) sold real estate to an entity wholly owned by the defendant, Philip Mans (Mans) and were paid approximately $275,000.00 cash and were given a promissory note in the amount of $187,500.00. The note was guaranteed by Mans, and was secured by a second mortgage on the property which was duly recorded at the Registry of Deeds. (The mortgage was junior to a mortgage to Mascoma Savings Bank.) The mortgage prohibited the defendant from conveying the property without the prior written consent of the plaintiffs, and further stated that, on such a sale, the whole of the remaining indebtedness secured by the mortgage would, at the option of the holder of the mortgage, be immediately due and payable. On or about October 8, 1987, in direct violation of these terms of the mortgage, Mans caused a transfer of title of the mortgaged property to a partnership known as Crescent Beach Development ("Crescent Beach").

The transfer, pursuant to the terms of the mortgage, triggered the due-on-sale clause, but the plaintiffs were unaware that the transfer had taken place. In fact, Mans had intentionally concealed the transfer in such a way as to defraud the plaintiffs, by sending a letter purportedly seeking permission for the transfer, AFTER the transfer was

nearly complete. Specifically, the letter, dated October 8, 1987, advised the Fields that Mans had taken on a partner in the development of the property. The letter further went on to say:

> Obviously we do not want to trigger the "due-on-sale" clause by reason of the transfer of the property into the development partnership. We ask that Mr. and Mrs. Field, as the holders of the second mortgage, consent in writing to the transfer of the property.

The Fields responded by letter dated October 19, 1987. Among other conditions, they stated that they would approve the transfer if they received a payment of $10,000.00. Mans, through counsel, responded on October 27, 1987 that "the fee of $10,000.00 is out of the question." However, Mans in this October 27, 1987 correspondence did not disclose to the Fields that the transfer had actually already taken place despite the lack of consent.

The Fields, subsequent to the undisclosed transfer, continued to receive payments on the note through November, 1990. No further payments were forthcoming, and the Fields received notice of Mans' voluntary bankruptcy petition in December of 1990. The Mascoma Bank foreclosed on

the property on or about June 7, 1991, netting their first mortgage. No funds were available to satisfy the Fields' second mortgage.

The Fields filed a non-dischargeability complaint against Mans in the Bankruptcy Court under the provisions of 523 (a)(2)(A) arguing that they were "duped" into extending credit (the promissory note) beyond its time period (option to call upon subsequent transfer) by Mans' fraud in obscuring the fact that he transferred the property. Federal Court jurisdiction over this matter was grounded on Article I of the United States Constitution, and Title 11 of the United States Code. After trial, the Bankruptcy Court found that in fact an extension of credit was proven, that actual fraud had taken place and that reliance was proven, but that the plaintiffs failed to prove that their reliance on the fraud was reasonable.

ARGUMENT

The courts are divided as to the issue of whether or not reasonableness of reliance must be proved under § 523 (a)(2)(A).[1] There is also considerable division within some circuits, more notably the 2nd[2] and 11th[3] circuits.

Nothing in the text of § 523 (a)(2)(A) requires that a creditor prove that his reliance on the debtors' fraud was reasonable, as would be a requirement if the plaintiff had chosen to proceed under § 523 (a)(2)(B).

"When interpreting a statute, the starting point is, of course, the language of the statute itself. If the language is clear and unambiguous, and there is no clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." National Freight Inc. v. Larson 760 F. 2d 499, 503 (1985), referencing American Tobacco Co. v. Patterson 456 U.S. 63, 68 (1982) and Consumer Product Safety Commission v. GTE Sylvania, Inc. 447 U.S. 102, 108 (1980).

The language of the statute in question here is clear and unambiguous. § 523 (a)(2)(A) excepts from discharge those debts which are "... for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by -- false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition; ..." 11 U.S.C.A. § 523 (a)(2)(A) (West 1993).

However, should it be found that the above language is ambiguous regarding the issue of reasonable reliance, one must look to the intent of Congress in enacting the Statute, prior to expanding or narrowing the scope of the statutory exception through judicial interpretation. See U.S. v. Lamp 606 F. Supp. 193, 197 (D.C.W.D. Texas 1985) and Jordan v. Montgomery Ward & Co. 442 F. 2d 78, 81 (8th Cir. 1971).

In Jordan, the Court referenced the Congressional Record to support its conclusion that the language in one section of a statute, allowing for civil actions regarding consumer credit transactions, did not apply to another section of the same statute, concerning credit advertising. In particular, the Court referenced language in the Congressional Record specifically exempting advertising requirements from the private civil relief provision. Jordan at 81.

In reference to 11 U.S.C § 523 (a)(2)(A) and (a)(2)(B), the Congressional Record states specifically that "Subparagraph (A) is mutually exclusive from subparagraph (B)". Congressional Record - House, Daily Edition September 28, 1978, at [H 11096], Congressional Record - Senate, daily Edition October 6, 1978, at [S 17412]. Only § 523 (a)(2)(B) requires proof of reasonable reliance on the part of the creditor, § 523 (a)(2)(A) does not.

The leading case in the area, and the most compelling argument for the proposal that reliance need not be proven to be reasonable to except a debt from discharge under § 523 (a)(2)(A), is IN RE Ophaug 827 F. 2d 340 (8th Cir. 1987). In Ophaug the plaintiffs had lent money to the defendant, who subsequently filed Chapter 11 bankruptcy proceedings. The plaintiffs filed a complaint seeking to have the debt declared non-dischargeable on the grounds that the debtor obtained the loan by knowingly making a false statement to the plaintiffs, on which they relied. The debtor had obtained a loan from the creditors in the amount of $90,000.00, purportedly to purchase farmland. He had pledged to the plaintiffs a security interest in equipment and machinery to secure the debt. Unbeknownst to the creditors, the debtor never had any intention of purchasing land, and had already used

the pledged machinery as collateral for prior obligations. The plaintiffs obtained a state court judgment against the defendant, but the defendant subsequently filed for a Chapter 11 bankruptcy. The Bankruptcy Court found that while the debtor had made misrepresentations, upon which the creditors had relied, the reliance was unreasonable, and therefore the debt was dischargeable. The District Court affirmed. Ophaug at 398.

In reversing the District Court, the 8th Circuit Court of Appeals referred to the unambiguous language of the statute, as well as the stated intent of Congress, (as previously referenced in this petition, see Congressional Record), to support the contention that reasonableness, while a requirement under § 523 (a)(2)(B), is NOT a requirement under § 523 (a)(2)(A). Id. at 401.

In conclusion, the decision of the United States Court of Appeals for the First Circuit is in direct conflict with the decisions of various United States Courts of Appeals on this same issue, making this case an ideal vehicle for addressing this issue and settling the matter of reasonable reliance as it pertains to 11 U.S.C. § 523 (a)(2)(A). In accepting this case, the Court would further the intent of United States Supreme Court Rule 10.1(a) in clearing up the disparity between the circuits,

as well as Rule 10.1(c) since the question is an important question of Federal law which has not been but should be settled by the Court. Acceptance of this case by the Supreme Court would further the intent of Congress that the Bankruptcy laws be uniform throughout the circuits. If this case is not heard by this Court, it is likely that the First Circuit and other circuits will continue to render decisions in conflict with each other and in conflict with the intent of Congress in enacting the Bankruptcy Code.

Respectfully submitted,
William and Norinne Field,
By and through counsel

_____
Christopher J. Seufert, Esq.
Counsel of Record

NOTES:

[1]See 97 ALR Fed 402 for analysis.

REASONABLE RELIANCE REQUIRED:

Circuit Courts of Appeals:

IN RE Burgess 955 F. 2d 134
(1st Cir. 1992)

Philips v. Coman 804 F. 2d 930
(6th Cir., 1986)

IN RE Mallet 817 F. 2d 677
(10th Cir. Colo. 1987)

District Courts:

IN RE Hunt 30 BR 425 (MD Tenn. 1983)

IN RE McIntyre 64 BR 27 (D.N.H. 1986)

IN RE Michel 74 BR 88 (N.D. Ohio 1985)

Title Ins. Corp. v. Pitt.
157 BR 585 (E.D. Va. 1991)

Bankruptcy Courts:

IN RE Paolino 89 BR 453
(B.C. E.D. Pa. 1988)

IN RE Wise 6 BR 867
(B.C. MD. Fla. 1980)
(discussing 523(a)(2) in general)

IN RE Ashley 5 BR 262
(B.C. E.D. Tenn. 1980)

Bonosky v. Allen 25 BR 566
(B.C. S.D. Ohio 1982)

IN RE Constantino 72 BR 231
(B.C. N.D. Ohio) later proceeding
80 BR 865

IN RE Cheh 96 BR 781
(B.C. N.D. Ohio 1988)

IN RE Cicero 28 BR 480
(B.C. E.D. Wis. 1983)

IN RE Guy 101 BR 961
(B.C. N.D. Ind. 1988)

IN RE Younesi 34 BR 828
(B.C. C.D. Cal. 1983)

IN RE Howarter 95 BR 180
(B.C. S.D. Cal. 1989)

IN RE Brewood 15 BR 211
(B.C. D.C. Kan. 1981) (disapproved
on other grounds by
Birmingham Trust Nat. Bank v. Case
755 F. 2d 1474
(11th Cir. Ala. 1985))

IN RE Maranzino 67 BR 394
(B.C. D.C. Kan. 1986)

IN RE Anzman 73 BR 156
(B.C. D.C. Colo. 1986)

IN RE Gering 69 BR 686
(B.C. D.C. Kan. 1987)

IN RE Beleau 35 BR 259
(B.C. D. RI 1983)

IN RE Salvatore 46 BR 247
(B.C. D. RI 1984)

Matter of Eaton 41 BR 800
(B.C. E.D. Wis. 1984)

Matter of Weinstein 31 BR 804
(B.C. E.D. NY 1983)

IN RE Gonzalez Seijo 76 BR 11
(B.C. D. PR 1987)

IN RE Waning 120 BR 607
(B.C. D. Me. 1990)

IN RE Sestito 136 BR 602
(B.C. D. Mass. 1992)

Matter of Haining 119 BR 460
(B.C. D. Del. 1990)

State v. Spicer (B.C. D.C.
Dist. Col. 1993)

ITT Fin. Servs. v. Schoenlein
157 BR 824 (B.C. N.D. Ohio 1993

First Bank Sys., N.A. v. Foley
156 BR 645 (B.C. D.C. ND 1993)

MERE RELIANCE SUFFICIENT:

Circuit Courts of Appeals:

IN RE Ophaug 827 F. 2d 340
(8th Cir. 1987) 97 ALR Fed. 395

Matter of Allison 960 F. 2d 481
(5th Cir. 1992).

Bankruptcy Courts:

IN RE Showalter 86 BR 877
(B.C. W.D. Va. 1988)

IN RE Hamm 92 BR 386
(B.C. W.D. Mo. 1989)

IN RE Kroh 88 BR 972
(B.C. W.D. Mo. 1988)

IN RE Stewart 91 BR 489
(B.C. S.D. Iowa 1988)

IN RE Fosco 14 BR 918
(B.C. D.C. Conn. 1981)

IN RE Sobel 37 BR 780
(B.C. E.D. NY 1984)

IN RE Monahan 125 BR 697
(B.C. D. RI 1991)

IN RE Schwartz and Meyers 130 BR 416
(B.C. S.D. NY 1991)

IN RE McDermott 139 BR 50
(B.C. D. RI 1992)

"Justifiable" rather than "reasonable" reliance required:

IN RE Kursh 973 F. 2d 1454
(9th Cir. 1992).

[2]Reliance required: IN RE Newmark 20 BR 842 (B.C. E.D. N.Y. 1982), IN RE Esposito 44 (BR 817 (B.C. S.D. N.Y. 1984) Reliance not required: IN RE Schwartz & Meyers 130 BR 416 (B.C. S.D. N.Y. 1991), IN RE Fosco 14 BR 918 B.C. D.C. Conn. 1981), and N RE Sobel 37 BR 780 B.C. E.D. N.Y.)

[3]Reasonable reliance required: IN RE Black 113 BR 79 (B.C. M.D. Fla. 1990). Neutral position re: reasonableness of reliance: IN RE Firestone 26 BR 706 (B.C. S.D. Fla. 1982)

United States Court of Appeals
for the First Circuit

No. 94-1391

WILLIAM FIELD AND NORINNE FIELD,
Plaintiffs, Appellants,

v.

PHILIP W. MANS,
Defendant, Appellee.

JUDGMENT

Entered: August 29, 1994

This cause came on to be submitted on the briefs and original record on appeal from the United States District Court for the District of New Hampshire.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

Francis P. Scigliano

Clerk.

United States Court of Appeals
For the First Circuit

No. 94-1391

WILLIAM FIELD AND NORINNE FIELD,
Plaintiffs, Appellants,

v.

PHILIP W. MANS,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

[Hon. Martin F. Loughlin,
U.S. Senior District Judge]

Before

Torruellá, Chief Judge,
Selya and Cyr, Circuit Judges.

Christopher J. Seufert on brief for appellants.

Philip W. Mans on brief pro se.

August 29, 1994

Per Curiam. Having reviewed carefully the briefs and the record in this case, we affirm the judgment of the district court, affirming the decision of the bankruptcy court denying appellants' request to have the debt of approximately $150,000 of appellee to appellants excepted from discharge under 11 U.S.C. § 523(a)(2)(A).

This circuit has determined that to establish that a debt is nondischargeable under 11 U.S.C. § 523(a)(2)(A) a creditor must prove, inter alia, that his "reliance was reasonable in the circumstances." In re Burgess, 955 F.2d 134, 140 (1st Cir.) 1992). Since we find no clear error, see In re Corporacion de Servicios Medicos Hospitalarios de Fajardo, 805 F.2d 440, 447-48 (1st Cir. 1986) (determination of reasonableness reviewed for clear error), in the finding by the bankruptcy court that the creditors' reliance in this case was not reasonable, the judgment below is affirmed.[1]

[1] In bankruptcy matters, this court conducts an independent review of both the factual and legal findings of the bankruptcy court. In re G.S.F. Corp., 938 F.2d 1467, 1474 (1st Cir. 1991). Therefore, any error committed by the district court in findings of fact during its review of the bankruptcy court decision would be harmless.

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

William Field, et. al.

v. #C-93-401-L

Philip W. Mans

ORDER

Before the court is the appellants', William Field and Norinne Field's Motion For Reconsideration (doc #11) and the appellee's, Philip W. Mans, Opposition to Motion For Reconsideration (doc #12). For the reasons stated below, the appellants' motion is denied.

PROCEDURAL HISTORY

Philip W. Mans filed for discharge in bankruptcy pursuant to Chapter 11 in December 1990. The Fields filed to have approximately $150,000.00 of debt excepted from discharge pursuant to 11 U.S.C.S. § 523(a)(2)(A). The case was heard on May 11, 1993 in United States Bankruptcy Court for the District of New Hampshire by Judge Yacos. Judgment was rendered for Mr. Mans with a finding that although the debtor made misrepresentations upon which the creditor relied, the creditor's reliance was not reasonable. This court affirmed the Bankruptcy Court's ruling in a previous order, In re Mans, No. 93-401-L

(D.N.H. December 7, 1993). Mr. Field has filed a Motion For Reconsideration of that Order.

FACTS

Mr. Field asserts that the court cited a conversation between Mr. Field and a Mr. DeFelice which never took place as grounds for its finding that Mr. Fields' reliance on the appellee's misrepresentations was not reasonable. Mr. Field asserts that the conversation which did occur was between a Mr. DeFelice, the man who claimed an ownership interest in the property, and a Mr. Lucido, Mr. Field's employer. Mr. Field later became aware of the conversation when Mr. Lucido told him of it. Mr. Field argues that because the court's finding that Mr. Field's reliance was not reasonable was grounded on an erroneous finding of fact, the court's affirmation of the Bankruptcy Court's Ruling is also erroneous.

DISCUSSION

A district court may reconsider a judgment or order and order relief from same on grounds of mistake or excusable neglect or fraud or general fairness. Fed. R. Civ. P. 60(b). Such motions are "committed to the district court's discretion." FDIC v. Ramirez-Rivera, 869 F.2d 624, 626 (1st Cir. 1989). See Anderson v. Cryovac, Inc. 862 F.2d 910, 923 (1st Cir. 1988).

An error of law or fact by a district court in a civil case does not necessarily mandate automatic reversal. No error or defect in any ruling or order by the court is grounds for vacating or modifying an order, "unless refusal to do so appears to the court inconsistent with substantial justice" Fed. R. Civ. P. 61. The court "must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties." Fed. R. Civ. P. 61. Therefore, assuming that the court did make an error of fact or law, the court need not reverse if the error was harmless.

Technically, Mr. Field is correct. The court did mistakenly refer to a conversation between Mr. Field and a Mr. DeFelice which never occurred. The court's order stated that "the [bankruptcy] court cites Mr. Field's conversation with Mr. DeFelice, the new partner, during which Mr. DeFelice commented that he was the new owner." Order, December 7, 1993, page 7.

The section of the transcript upon which the court relied reads as follows:

> COURT: In that regard, the evidence is that in 1988 -- or first that the Fields -- at least Mr. Field visited the property on numerous occasions to see whether -- and what kind of development Mr. Mans was doing, and that on one occasion, his boss told

him that he -- the boss had been on the property and had see a Mr. DeFelice who had stated that, quote "I am the new owner," unquote. The evidence also indicates that Mr. Field discussed this with the banker that held the first mortgage on the property and didn't get any information but demonstrates that he knew that DeFelice was claiming to be the owner of the property. Mr. Field apparently in his own mind believed that the property could not have been transferred without his consent which of course as a matter of law is not true.

(Transcript p. 81-82). Further examination of the transcript shows that "boss" does indeed refer to a Mr. Lucido. Mr. Field testified that "Mr. Lucido is my boss. He said he was up on the property ... and he met someone there and they said that they were the new owner, this Mr. DeFelice." (Transcript p. 13).

However, the error does not change the analysis of the court. The essence of the conversation was the same. The effect of the conversation on Mr. Field was the same. Mr. Field became aware that a Mr. DeFelice claimed some sort of ownership interest in the property which lead him to investigate the situation. Specifically, Mr. Field spoke with the Bank and later with Mr. Mans. Given that Mr. Field learned that someone

else claimed a property interest and that Mr. Mans previously had approached him regarding the due on sale clause, it is not reasonable that Mr. Field relied on Mr. Mans' misrepresentation.

The court finds that the error does not affect its analysis of whether Mr. Field's reliance on the misrepresentation was reasonable. The error did not affect any substantial rights of the parties and was thus harmless error. Accordingly, the motion for reconsideration is denied.

CONCLUSION

The appellants' Motion For Reconsideration is denied because the court's error was harmless.

March 22, 1994

/s/
Martin F. Loughlin
Senior Judge

Christopher J. Seufert, Esq.
Philip W. Mans
George Vannah, Clerk
U.S. Bankruptcy Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Fields

v. Civil Action No. 1:93-CV-00401-L

Mans

J U D G M E N T

JUDGMENT is hereby entered in accordance with Senior Judge Martin F. Loughlin's order dated December 7, 1993. (Signed by Clerk James R. Starr)

By the Court,

/s/Kelly A. Papas

Deputy Clerk

Date: January 27, 1994

cc: David H. Ferber, Esq.
Christopher J. Seufert, Esq.
Steve J. Bonnette, Esq.
Philip W. Mans
George Vannah

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

In re Philip mans

#C-93-401-L

ORDER

Before the court is the appellants/plaintiffs, William and Norinne Field's, appeal from a Bankruptcy Court ruling issued by Judge James J. Yacos on May 11, 1993. For the reasons stated below, the Bankruptcy Court's ruling is affirmed.

PROCEDURAL HISTORY

Appellee, Philip W. Mans filed for discharge in bankruptcy pursuant to Chapter 11 in December 1990. Appellants filed to have approximately $150,000.00 of debt excepted from discharge pursuant to 11 U.S.C.S. § 523(a)(2)(A). The case was heard on May 11, 1993 in U.S. Bankruptcy Court for the District of New Hampshire by Judge Yacos. Judgment was rendered for the appellee with a finding that even though the debtor made misrepresentations upon which the creditor relied, the creditor's reliance was not reasonable.

FACTS

The appellants, William and Norinne

Field, sold real estate on Mascoma Lake in Enfield, New Hampshire to the appellee, Philip W. Mans. The appellants were paid $275,000.00 in cash and were given a note for $187,500.00. The note was personally guaranteed property. The note was junior to a mortgage held by the Mascoma Savings Bank. The second mortgage contained a due-on-sale clause which stated that in the event that the appellee conveyed the property without the prior consent of the appellants the remaining indebtedness secured by the mortgage would be immediately due and payable at the option of the mortgage holder.

On October 8, 1987, the appellee transferred the property to a newly formed partnership, Crescent Beach Development. On October 9, 1987, the appellee wrote to the appellants informing them that he had brought in an investor and formed the new partnership. The letter stated that the appellee did not want to trigger the due-on-sale clause with a transfer to the development partnership and asked that the appellants consent. On October 19, 1987, the appellants responded by letter which indicated that they would consent to the transfer on several conditions. The appellants wanted $250.00 lost interest due from the previous closing, future payments to be made by direct bank transfer, $250.00 for attorney's fees to negotiate the consent and a $10,000.00 fee.

On October 27, 1987, the appellee agreed to all the terms except the $10,000.00 demand. Bankruptcy was filed over three years later on December 10, 1990; however, no further correspondence passed between the parties until February 6, 1991 at which time the appellants' attorney informed them that he had researched the deed and discovered the transfer.

The Bankruptcy Court found that the letters from the appellee to the appellants did contain an implicit misrepresentation: the property had not yet been transferred. The court also found that the appellants did rely upon this representation and thereby extended credit to the appellee when they could have called the due-on-sale clause as of October 1987. Lastly, the court found that the appellants' reliance on the misrepresentations was not reasonable.

The issue on appeal is whether reasonable reliance on a debtor's fraudulent actions, statements, or misrepresentations is an element in excepting a debt from discharge in bankruptcy pursuant to 11 U.S.C.S. § 523(a)(2)(A) and if so, whether it was it clearly erroneous to find that the creditor's reliance on the debtor's misrepresentations was unreasonable.

DISCUSSION

In an appeal from a bankruptcy court's decision, a district court "may affirm, or reverse a bankruptcy judge's judgment." Bankr. Proc. Rule 8013. A district court reviews the bankruptcy court's determination of law by de novo review, In re Navigation Technology Corp., 880 F.2d 1491, 1493 (1st Cir. 1989), and the bankruptcy court's findings of fact using the clearly erroneous standard. Biden v. Foley, 776 F.2d 379, 381 (1st Cir. 1985). A finding is clearly erroneous when, "'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" In re McIntryre, 64 B.R. 27, 29 (D.NH 1986) quoting D. Federico Company v. New Bedford Redevelopment Authority, 723 F. 2d 122, 126 (1st Cir. 1983).

Appellants argue in their brief that a division exists in the First Circuit as to whether reasonable reliance is an element of non-dischargeability of debt under the bankruptcy code. That assertion is incorrect.

The First Circuit Court of Appeals has stated that "reasonable" reliance is an element in proving nondischargeable debt under 11 U.S.C. § 523(a)(2)(A). In In re Burgess, 955 F.2d 134, 140 (1st Cir. 1992), the court held that under

11 U.S.C. § 523(a)(2)(A) one of the elements the creditor was required to prove was that "the creditor's reliance was reasonable in the circumstances." Also, the court stated that statutory requirements for discharge in bankruptcy must be construed liberally in favor of the debtor and reasons for denying discharge must be real and substantial, not merely technical and conjectural. Burgess, 955 F.2d at 137.

Appellants rely substantially upon two Rhode Island district court cases, In re Monahan, 125 B.R. 697 (Bkrtcy.D.R.I. 1991) and In re McDermott, 139 B.R. 50 (Bkrtcy.D.R.I. 1992), as support for their argument that the first circuit is divided on the issue of "reasonable" reliance. In Monahan, the court held that reasonable reliance was limited to causes of action under § 523(a)(2)(B) and not subsection (A). Monahan, 125 B.R. at 699. The court stated that the four elements listed in the statute are all that are needed to state a § 523(a)(2)(A) claim, and rejected those cases which included the additional requirement of reasonable reliance. Monahan, 125 B.R. at 699. The court justified its position by adding that the policy of liberally interpreting exceptions to discharge was not meant to protect a dishonest debtor. Monahan, 125 B.R. at 700. In McDermott, the court followed Monahan and noted that reasonable reliance by

the creditor is not required under § 523(a)(2)(A). McDermott, 139 B.R. at 52, n.5.

However, both of these are district court opinions which were decided the year before and the year of In re Burgess respectively. As the Court of Appeals for the First Circuit has since ruled conclusively in In re Burgess, the two Rhode Island cases indicate no division on the issue of reasonableness.

Appellants also claim that in In re Lane the First Circuit Court of Appeals declined to take a position on the issue of reasonable reliance as a required element of a § 523(a)(2)(A) claim. 937 F.2d 694 (1st Cir. 1991). Appellants argue that this indicated a move away from the reasonable reliance requirement in the First Circuit. However, the First Circuit Court of Appeals did in fact take a position in In re Burgess, which states quite clearly that reasonable reliance is an element. Burgess, 955 F.2d at 140.

Two additional distinctions may also be made. The Lane court did concede in a footnote that not all courts require the reasonable reliance element and offered as example In re Ophaug, 827 F.2d 340, 342-43 and n.1 (8th Cir. 1987). Lane, 937 F.2d at 698. However, the Lane court declined to take a position because the record did adequately aver reasonable reliance.

Lane, 937 the record did adequately aver reasonable reliance. Lane, 937 F.2d at 698, n.8. Also, the Lane Court was applying New York substantive law. Lane, 937 F.2d at 696, n.3. As appellants note in their brief, there is considerable division within some circuits, "most notably the second and eleventh circuits." Appellant's br. at 10.

The court must now examine whether the bankruptcy court's finding that the appellants' reliance on the appellee's misrepresentations was reasonable under the circumstance. Burgess, 955 F.2d at 140. On review of the record below, the bankruptcy judge's ruling was not clearly erroneous.

Appellants claim that the court's ruling is inconsistent with determinations of fact and other statements made by the court during trial. Appellants base this contention on several statements made by the bankruptcy judge during trial. Specifically, the judge stated that "the letters obviously would tell anybody, layman or lawyer alike, that you hadn't yet transferred it. That's a necessary implication of it." (Tr. at 66). The court also stated at trial that "[t]hose letters would imply to a layman, that you hadn't yet transferred it and you're asking for his consent." (Tr. at 67). However, this is not inconsistent with the court's ultimate ruling that Mr.

Field's reliance was not reasonable.

The court stated the issue boiled down to the question of reasonable reliance. (Tr. at 81). However, the court did not find it unreasonable to rely on the fact that the appellee had to the appellee seeking permission to transfer the property without invoking the due-on-sale clause. (Tr. at 83). The court found it was unreasonable to rely on the fact that the appellee would not transfer the property absent the appellants' consent. The court specifically found that "there's no statement in the letters that could be read as saying we will never transfer the property without your consent." (Tr. at 83). The court supported its determination of unreasonable reliance with several instances where the appellants could have determined they needed to check on the status of property ownership. Specifically, the court cites Mr. Field's conversation with Mr. DeFelice, the new partner, during which Mr. DeFelice commented that he was the new owner. (Tr. at 81-2). This statement prompted Mr. Field to check with the bank. (Tr. at 82). The court stated that "at a minimum., a prudent man, I think, would have asked his attorney." (Tr. at 85).

CONCLUSION

The bankruptcy court's ruling is affirmed because reasonable reliance is a requirement element to find nondischargeable debt pursuant to 11 U.S.C. § 523(a)(2)(A) and because the record supports the finding that the appellants' reliance on the appellee's misrepresentations was not reasonable.

December 7, 1993

/s/
Martin F. Loughlin
Senior Judge

Christopher J. Seufert, Esq.
Philip W. Mans
U.S. Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re:
Philip W. Mans, BK No. 90-12385
Debtor Chapter 7

William and Norinne Field
Plaintiffs ADV No. 91-1194
Jgmt. #46
Book #4

v.

Philip W. Mans,
Defendant

FINAL JUDGMENT

This adversary proceeding came on for trial on May 11, 1993 and the Court have dictated its findings and conclusions into the record which are incorporated herein by reference, hereby orders as follows:

1. Judgment is hereby entered for the Defendant, Philip W. Mans, finding the debt in question dischargeable.

2. Each party shall bear their own fees and costs.

DONE and ORDERED this 11th day of May, 1993 at Manchester, New Hampshire.

/s/
JAMES E. YACOS
BANKRUPTCY JUDGE